No. 182.

In the Supreme Court of the United States

October Term, 1948.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UPTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, *Appellants*,

vs.

EMPIRE STORAGE AND ICE COMPANY, a Corporation, *Appellee*.

BRIEF FOR APPELLEE.

RICHARD K. PHILLIPS,
JERRY T. DUGGAN,
GAGE, HILLIX & PHILLIPS,
1009 Bryant Building,
Kansas City, Missouri,
Attorneys for Appellee.

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BRIEF FOR APPELLEE.

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STATEMENT.

The statement made by appellants is not in all respects consistent with the facts upon which the decision of the Supreme Court of Missouri is based. It is to be emphasized that the nonunion ice peddlers, whom the union sought to organize, are in fact independent businessmen and that the only relationship between the appellee and the peddlers is that of manufacturer and customer. Appellee had no control whatsoever over the ice peddlers, and there is no history of employment of ice deliverymen by the appellee.

The Court's attention is directed to the fact that all of appellee's employees are union members, and the product produced by the appellee is a union product. As pointed out by the Missouri Supreme Court in its opinion (210 S. W. (2d) 55, 57), there was no dispute between the appellee and its employees.

In addition to restricting appellee's business to the extent of 85 per cent, the withdrawal of transportation service from appellee's establishment endangered quantities of perishable commodities, principally foodstuffs, owned by various customers of appellee in the metropolitan area of Kansas City. The picketing carried on by the appellants interfered with the business of persons who were complete neutrals in the dispute between the appellants and the ice peddlers.

In their statement appellants again assert that the purpose of their picketing was lawful. This assertion is contrary to the determination of the Supreme Court of Missouri, which was based upon admissions made by appellants in their testimony in the trial court. In this testimony (R., p. 39) appellant Jenkins admitted that the purpose of the picketing was to curtail appellee's business. The Court's attention is directed to the fact that the appellee was faced with an impossible alternative. It could accede to the demands of the union and become a party to the appellants' unlawful combination, or it could stand by and permit destruction of its business and the destruction of the property of its customers.

The opinion of the Missouri Supreme Court was based upon the single ground that the conduct of the appellants violated the criminal law of the state, and, therefore, was not entitled to the protection of the constitutional provisions upon which the appellants rely.

ARGUMENT.

I.

The unlawful conduct of appellants cannot be considered an exercise of the right of free speech protected by the Constitution.

A. It is within the power of the State to enact and enforce reasonable restrictions upon picketing.

The appellants are here contending that a state is powerless to limit peaceful picketing. Not one of the cases cited by the appellants sustain that proposition. The Meadowmoor Dairies case (*Milk Wagon Drivers* v. *Meadowmoor Dairies*, 312 U. S. 287), cited by the appellants, expressly recognizes the authority of the state to restrain peaceful picketing under certain circumstances. While it is true that there was no violence or threat of violence in the instant case, and the case, therefore, may be distinguished from the Meadowmoor case, the latter case does not foreclose the right of the state to regulate peaceful picketing.

Missouri's highest court has frequently held (see *Lohse Patent Door Company* v. *Fuelle*, 215 Mo 421, 114 S. W. 997; *Hughes* v. *Motion Picture Machine Operators*, 282 Mo. 304; 221 S. W. 95; and *Rogers* v. *Poteet, et al.*, 355 Mo. 986; 199 S. W. (2d) 378) that the destruction of property and property rights in contracts by conduct identical with that of the appellants in this case is both a form of violence and of threats of violence as truly as are destructive physical acts, and as such, is within the interdiction of the state anti-trust laws and without the constitutional guarantee of the First Amendment.

The Lake Valley case (*Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91) turns solely

upon the application of the Norris-LaGuardia Act to injunction suits in Federal courts. As pointed out in the decision of the Missouri Supreme Court in the case of *Rogers* v. *Poteet, et al., supra*, the courts of the State of Missouri are not limited by legislation such as the Norris-LaGuardia Act.

Contrary to the appellants' contention, the very cases cited in appellants' brief establish definitely that a state may impose limitations upon the right to engage in peaceful picketing. In the Wohl case (*Bakery and Pastry Drivers and Helpers* v. *Wohl*, 315 U. S. 769) this Court said:

> "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."

In *Carpenters' and Joiners' Union* v. *Ritter's Cafe* (315 U. S. 722, l. c. 725) this Court stated:

> "The right of the state to determine whether or not the common interest is best served by imposing some restriction upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted."

In *Thornhill* v. *Alabama* (310 U. S. 88, l. c. 103) the Court said:

> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the state to set the limits of permissible contest open to industrial combatants."

It is submitted that, on the basis of repeated assertions by this Court, there can no longer be any doubt as to the state's power to regulate even peaceful picketing.

B. Picketing, though not characterized by physical violence, nevertheless may be enjoined if it is unlawful or coercive.

In the instant case the courts of Missouri found that the picketing conducted by the appellants was part of an unlawful conspiracy in restraint of trade in violation of Section 8301 of the Statutes of the State of Missouri. The Court found that the purpose of such picketing was unlawful and that the appellants attempted to coerce the appellee to become a part of their unlawful conspiracy. When the appellee refused to violate the law, the union proceeded to destroy its business. The property of appellee and the property of its customers, all neutrals in the dispute between the union and the nonunion ice peddlers, was threatened with destruction just as certainly as though there had been threats of overt acts of violence against the property. Both appellee and its customers were neutrals in the dispute between the union and the nonunion ice peddlers. Instead of destroying the property by violence the union employed a subtler but no less effective method—the withdrawal of local transportation service. But for the injunction perishable commodities would have been destroyed. The mere absence of physical violence does not purge the conduct of appellants of its illegality. The portion of the Court's opinion in the Wohl case, *supra*, quoted by appellants on page 12 of their brief, suggests that picketing attended by any of the following:

> "violence, force, or coercion, or conduct otherwise unlawful or oppressive"

is beyond the protection of the constitutional provisions relied upon by the appellants.

Recognition of the principle that peaceful picketing may be enjoined if its purpose is contrary to statutory law is found in the recent case of *United Brotherhood of Carpenters and Joiners* v. *Sperry*, decided by the United States Court of Appeals, 10th Circuit, Case Number 3654, September term, 1948 (not yet reported). This case was a mandatory injunction action under Section 10(1) of the Taft-Hartley Act. The Regional Director of the N. L. R. B. applied to the District Court for an injunction restraining the union from picketing and other acts which violated Section 8(b) (4)(A) of the Act. The union defended on the ground that the use of "we do not patronize" lists and peaceful picketing were protected by the First Amendment to the Constitution of the United States. In affirming the decree of the District Court granting the injunction, the Court of Appeals said:

> "The further contention is that the use of the 'we do not patronize' lists and the peaceful picketing of the Klassen premises were protected by the First Amendment to the Constitution of the United States and by Section 8(c) of the Act. The pertinent part of the First Amendment guarantees freedom of speech and press, and Section 8(c) provides that expressions of views or opinions shall not constitute an unfair labor practice under the Act if they do not contain any threat of reprisal, or force, or promise of benefit. The promulgation and circulation of a blacklist and the peaceful picketing of premises in the course of a labor dispute may constitute a phase of the constitutional right of free utterance, if the blacklist is confined to the name of the employer *primarily* involved in the controversy and the picketing is confined to the premises of such employer. *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769; *Thomas* v. *Collins*, *supra*. But

the guaranty of free speech and free press contained in the First Amendment does not compel the United States to tolerate in all places and under all circumstances even peaceful picketing, if it has harmful effect upon interstate commerce. The constitutional right of free speech and free press postulates the authority of Congress to enact legislation reasonably adapted to the protection of interstate commerce against harmful encroachments arising out of secondary boycotts. The promulgation and circulation of a blacklist and the picketing of premises as the means of waging a secondary boycott *which has the effect of substantially burdening or obstructing interstate commerce is not protected by the First Amendment or Section 8(c) of the Act.* Concretely, *neither the constitutional nor statutory provision protected appellants* in their blacklisting of Klassen and their picketing of its premises as a means of *waging a secondary boycott against that company, with substantially harmful effect upon interstate commerce. Cf. Carpenters' and Joiners' Union of America* v. *Ritter's Cafe, supra.*" (Emphasis supplied.)

In the above case a federal statute limiting peaceful picketing in instances in which such picketing constitutes an unlawful restraint of commerce was found to be within the proper sphere of Congressional regulation and not invalid as contrary to the Constitutional guaranty of freedom of speech. The picketing enjoined in the instant case was also *secondary* and would also violate the provisions of the Taft-Hartley Act involved in the Sperry case. The restraint on peaceful picketing is no greater in this case. The state statute here enforced by the state courts is directed toward the elimination of the same evil involved in the Sperry case—restraint of commerce and trade. The fact that a state, rather than a federal statute, is involved

does not alter the fundamental constitutional principles with which this Court is concerned.

C. The restraint of commerce and trade may be enjoined whether or not a labor dispute is involved.

The case of *Columbia River Packers Association, Inc. v. Hinton*, 315 U. S. 143, is in many respects analogous to the situation considered by the Supreme Court of Missouri in the instant case. In the Columbia River Packers case the union by-laws prohibited union members from selling fish "outside the union agreements." The union agreements required buyers to agree not to purchase fish from fishermen who were not members of the union. The petitioner refused to so agree, and as a result the union, through its monopoly of the fish supply, precluded petitioner from purchasing fish. The District Court, holding that the case did not grow out of a labor dispute and that the respondents had violated the Sherman Act, issued the injunction which the petitioner sought. The District Court was reversed by the Circuit Court of Appeals, and this Court in turn reversed the Circuit Court of Appeals.

Obviously the efforts of the union in the Columbia River Packers case were directed toward improving or protecting the economic position of the union members. The union cut off the petitioner's supply of fish because the petitioner insisted on reserving the right to purchase from nonunion fishermen. In the instant case the union objected to the sale of ice by the appellee to customers who were not members of the union. To force appellee to cease doing business with nonunion members, the union's monopoly on local transportation service was used to halt appellee's business.

Just as the union's method in the Columbia River Packers case violated federal anti-trust legislation, the union's conduct here considered violates state anti-trust legislation.

Since there is no state law in Missouri corresponding to the Norris-LaGuardia Act and since the latter Act applies only to federal courts, the question of whether or not there is a labor dispute is not important in this case. The all-important and basic fact is that the appellants violated the criminal law of the State of Missouri.

In the Wohl case, *supra*, the decision of the State court was based upon a determination that there was no labor dispute. The Supreme Court of Missouri does not base its decision in this case upon the existence or nonexistence of a labor dispute. The Court, in fact, quotes from the opinion of this Court in the Wohl case as follows:

> "Of course, that does not follow: One need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive."

Conceding that the existence of a labor dispute is not necessary in order to entitle one to protection under the Fourteenth Amendment, it is equally true that the existence or nonexistence of a labor dispute does not add to nor detract from the scope of the protection afforded by the Constitutional provisions. As stated by this Court in the case of *Carpenters' and Joiners' Union* v. *Ritter's Cafe*, *supra*:

> "The Constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved. *Thornhill* v. *Alabama*, 310 U. S. 88, 84 L. Ed. 1093,

60 S. Ct. 736, or because the communication takes the form of picketing, even when the communication does not concern a dispute between an employer and those directly employed by him. *American Federation of Labor v. Swing*, 312 U. S. 321, 85 L. Ed. 855, 61 S. Ct. 568. *But the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater Constitutional sanction or render it completely inviolable.*" (Emphasis supplied.)

The reasoning of the Supreme Court of Missouri in this case and the result reached are not inconsistent with any expression by this Court. Whether or not a labor dispute is involved in this case, the conduct of the appellants was unlawful, and, therefore, not within the scope of the freedom of expression guaranteed by the Constitution. It was upon this basis, and upon this basis alone, that the instant case was decided by the Supreme Court of Missouri, and the Court's opinion is sustained by the controlling decisions of this Court. The interpretation and application of a state statute is involved. The public policy of the State of Missouri is the foundation upon which the court's decision rests.

II.

The decision of the Supreme Court of Missouri that the criminal law of the state has been violated is expressive of the public policy of the state and is not reviewable.

A. The public policy of the State of Missouri prohibiting conduct such as that engaged in by the appellants is firmly established in the common law of the State and is expressed in the statute involved herein.

In this case the facts upon which the opinion of the Supreme Court of Missouri is based are admitted (210 S. W. (2d) 55, l. c. 57):

"The admitted purpose of defendant's picketing is clearly in violation of Section 8301. Defendant Jenkins testified his union had made agreements with the other ice companies of Kansas City under which the companies agreed not to sell ice to non-union peddlers. By their picketing defendants were attempting to force plaintiff to become a party to such combination. A combination for the purpose of refusing to sell to a certain person or persons is in direct violation of Section 8301."

The opinion of the Court is not an isolated application of the principle in question to matters of the type herein involved. In 1908, the Supreme Court of Missouri in *Lohse Patent Door Company* v. *Fuelle, supra,* declared the policy of this state to be that a conspiracy of two or more persons to injure the business of a person by means of a boycott is illegal. While the Lohse case did not involve picketing, it nevertheless established the policy of the state with regard to conspiracies in labor disputes. This policy was restated and emphasized in the case of *Hughes* v. *Kansas City Motion Picture Machine Operators, supra.* This latter case involved picketing, and the Court held that picketing pursuant to a conspiracy to destroy business was unlawful and a proper subject for injunctive relief. The Court also held that unlawful picketing was not protected by the guaranty of freedom of speech contained in the State and Federal Constitutions. To the same effect is the decision in *Purcell* v. *Journeymen Barbers*, 234 Mo. App. 843, 133 S. W. (2d) 662.

More recently the Supreme Court of Missouri has had occasion to apply the statute involved herein in a case involving picketing for a purpose declared to be unlawful (*Fred Wolferman, Inc.*, v. *Root*, 356 Mo. 976, 204 S. W. (2d) 733). In the Wolferman case the union relied

upon the identical cases cited in appellants' brief. The Court, referring to those cases, made the sound distinction that (l. c. 736):

> "In none of these cases just referred to was the picketing carried on for an unlawful purpose."

In the Wolferman case, just as in the instant case, the picketing union sought to coerce the company to do an unlawful act.

Similiarly, in *Rogers* v. *Poteet*, *supra*, the court enjoined conduct on the part of the union for the reason that a conspiracy in violation of Section 8301 was found to exist.

This Court denied certiorari in *Rogers* v. *Poteet*, 331 U. S. 847, and in *Fred Wolferman, Inc.*, v. *Root*, 333 U. S. 837.

If the relief granted in the Wolferman and Rogers cases did not infringe constitutional rights, then the relief afforded the appellee herein does not violate such rights.

B. The construction and application of Section 8301 of the Missouri Statutes by the Supreme Court of Missouri is conclusive.

This Court has consistently followed the principle that the interpretation of a state statute by the highest court of the state will not be disturbed. (*Sara Prince* v. *Commonwealth of Mass.*, 321 U. S. 158; *General Trading Company* v. *State Tax Commission of the State of Iowa*, 322 U. S. 335; *Reconstruction Finance Corporation* v. *County of Beaver, Pa.*, 328 U. S. 204.) In the case of *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, l. c. 477, this Court said:

"Those issues involved the construction and application of the statute and the Constitution of the State. As to them the judgment of its highest court is conclusive."

The Supreme Court of Missouri has determined that Section 8301 prohibits the conduct engaged in by the appellants. The criminal acts of the appellants and their purpose to coerce appellees to join with them in their illegal combination contravene the public policy of the State of Missouri. Under such circumstances the Court had the right, if not the duty, to protect appellee's business. This view was expressed in the case of *Gompers* v. *Buck's Stove and Range Company*, 221 U. S. 418, l. c. 439:

"Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virute of this right, powerful labor unions have been organized.

But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. *This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one.*" (Emphasis supplied.)

Conclusion.

The record in this case establishes:

I. That the appellants conspired to coerce appellees to refrain from selling ice to a certain group of its customers.

II. That to accomplish their unlawful purpose appellants picketed the premises of the appellee and effectively halted its business and that of its warehouse customers.

The appellants' purpose to restrain trade and commerce was unlawful and the means used to accomplish that purpose were likewise unlawful. Appellants' conduct, therefore, is not protected by the constitutional guaranty of freedom of speech.

We submit that the decision of the Supreme Court of Missouri sustaining the trial court's injunction is correct and in complete accord with principles long recognized by this Court. The judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

RICHARD K. PHELPS,
JERRY T. DUGGAN,
GAGE, HILLIX & PHELPS,
1007 Bryant Building,
Kansas City, Missouri,
Attorneys for Appellee.